

This draft, interim guidance is currently under review in accordance with Executive Order 12866, as amended. Upon completion of Executive Order 12866 review, the Department plans to make this guidance available in final form on this website and by publication in the Federal Register. Pending completion of the review, this guidance may be relied upon by the public. Members of the public are invited to submit comments on the draft, interim guidance by sending an email message to TRIAComments@do.treas.gov.

DEPARTMENT OF THE TREASURY

Departmental Offices

Interim Guidance Concerning the Terrorism Risk Insurance Reauthorization Act of 2007

AGENCY: Departmental Offices, Department of the Treasury

ACTION: Notice.

SUMMARY: This notice provides interim guidance to insurers, policyholders, state insurance regulators and the public concerning recent statutory amendments to the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297, 116 Stat. 2322) (the “Act”). Those amendments revise the definition of an “act of terrorism” covered by the Act, and make certain other changes. This notice addresses the changes to mandatory availability (“make available”) and disclosure requirements.

DATES: This notice is effective immediately and will remain in effect until superseded by regulations or by subsequent notice.

FOR FURTHER INFORMATION CONTACT: Howard Leikin, Deputy Director, Terrorism Risk Insurance Program (202-622-6770).

SUPPLEMENTARY INFORMATION:

This notice provides interim guidance to assist insurers, policyholders, state insurance regulators and the public in understanding certain requirements of the Terrorism Risk Insurance Act of 2002 as amended by the Terrorism Risk Insurance Program Reauthorization Act of 2007, pending the issuance of regulations by the Department of the Treasury. The interim guidance contained in this notice may be relied upon by insurers in complying with these statutory requirements prior to the issuance of regulations, but is not the exclusive means of compliance. This interim guidance remains in effect until superseded by regulations or subsequent notice.

I. Background

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) (“TRIA” or the “Act”). The Act became effective

immediately. It established a temporary Terrorism Risk Insurance Program (“TRIP” or the “Program”) of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism, as defined in the Act. The Act was scheduled to expire on December 31, 2005. The Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109-144) (Extension Act) extended TRIA through December 31, 2007. On December 26, 2007, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2007 (“Reauthorization Act”). The Reauthorization Act extends the Program through December 31, 2014 (with calendar years 2008-2014 being called the “Additional Program Years”). Other provisions of the Reauthorization Act:

- Revise the definition of “Act of Terrorism” to remove the requirement that the act of terrorism be committed by an individual acting on behalf of any foreign person or foreign interest in order to be certified as an “act of terrorism” for purposes of the Act.
- Define “Insurer Deductible” for all Additional Program Years as the value of an insurer’s direct earned premium for commercial property and casualty insurance for the immediately preceding calendar year multiplied by 20 percent.
- Set the Federal share of compensation for insured losses (subject to a \$100 million Program Trigger) for all Additional Program Years at 85 percent of that portion of the amount of insured losses that exceeds the applicable insurer deductible.
- Require Treasury to submit a report to Congress and issue final regulations for determining the pro rata share of insured losses to be paid under the Program when aggregate insured losses exceed the annual liability cap of \$100,000,000,000.
- Require the Secretary of the Treasury to notify Congress not later than 15 days after the date of an act of terrorism as to whether aggregate insured losses are estimated to exceed \$100,000,000,000.
- Require for policies issued after the date of enactment, that insurers provide clear and conspicuous disclosure to the policyholder of the existence of the \$100,000,000,000 cap at the time of offer, purchase, and renewal of a policy (in addition to current disclosure requirements).
- Revise the recoupment provisions of the Act. For purposes of recouping the Federal share of compensation under the Act, the “insurance marketplace aggregate retention amount” for all Additional Program Years is the lesser of \$27.5 billion and the aggregate amount, for all insurers, of insured losses during each Program Year. With regard to mandatory recoupment of the Federal share of compensation through policyholder surcharges, collection is required within a certain schedule specified in the Reauthorization Act. The limitation that

surcharges not exceed 3 percent of the premium charged for property and casualty insurance coverage under the policy is eliminated (but remains in the case of discretionary recoupment).

- Require Treasury to issue recoupment regulations within 180 days of enactment, and publish an estimate of aggregate insured losses within 90 days after an act of terrorism.
- Require the President's Working Group on Financial Markets to perform an ongoing analysis regarding the long-term availability and affordability of terrorism risk insurance and submit reports in 2010 and 2013.
- Require the Comptroller General to examine and report on the availability and affordability of insurance coverage for nuclear, biological, chemical, and radiological terrorist events; the future outlook for such coverage; and the capacity of insurers and State workers compensation funds to manage the risk associated with nuclear, biological, chemical, and radiological terrorist events.
- Require the Comptroller General to study and report on the question of whether there are specific markets in the United States where there are unique capacity constraints on the amount of terrorism risk insurance available.

II. Interim Guidance

Treasury will be issuing regulations to administer and implement TRIA, as amended by the Reauthorization Act. This notice is issued to assist insurers in complying with certain new statutory requirements pending the issuance of such regulations. This notice contains interim guidance concerning compliance with the mandatory availability or "make available" requirements in section 103(c) of the Act, and the disclosure notice requirements in section 103(b) of the Act. Other requirements in current regulations remain in effect.

Given the change in the definition of an "Act of Terrorism," will Treasury be issuing specific guidance concerning the language in property and casualty insurance policies?

As noted above, the Reauthorization Act revises the definition of an "act of terrorism" in section 102(1)(A)(iv) of TRIA and removes the requirement that the act be committed by an individual or individuals "acting on behalf of any foreign person or foreign interest" to be certified as an "act of terrorism".

Treasury understands that the language in property and casualty insurance policies describing a "certified" act of terrorism covered by TRIA and other (or "non-certified") acts of terrorism has varied. In addition, insurers have designed their insurance contracts and notifications to policyholders concerning potential changes to the certification criteria

for “acts of terrorism” differently. Insurers must determine how their policy language and particular circumstances are affected by the revised definition of an act of terrorism.

It is Treasury’s intent with this guidance and in subsequent regulations to address the statutory requirements and regulations of TRIA, as amended by the Reauthorization Act. The decision whether to certify an act of terrorism will be governed by the criteria in TRIA, as amended by the Reauthorization Act. Treasury will consider losses resulting from an act of terrorism (as now defined in TRIA) that are covered by an insurer under a policy for property and casualty insurance to be insured losses covered by the Program, provided the insurer makes payment to the policyholder in accordance with the terms and conditions of the policy, appropriate business practices, and other applicable requirements and conditions.

How do the “make available” and disclosure requirements apply to initial offers of coverage and offers of renewal?

There is no change to the TRIA requirements in section 103(c) that insurers make available, in all property and casualty insurance policies, coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism. However, because the “make available” requirements apply to “insured losses,” and an “insured loss” is defined, in part, as a loss resulting from an “act of terrorism,” the revision of the definition of an act of terrorism in the Reauthorization Act to eliminate the “foreign person or interest” element (i.e., to add what is often referred to as “domestic terrorism”) may have an impact on an insurer’s compliance with the “make available” requirements.

The Reauthorization Act is effective immediately upon enactment, December 26, 2007. The TRIA regulations in 31 CFR 50.21(a) generally provide that the “make available” requirements apply at the time of the initial offer of coverage or offer of renewal of an existing policy. Thus, any initial offers of coverage, or offers of renewal of existing policies, made on or after the date of enactment, must be consistent with the revised definition of act of terrorism.

The Reauthorization Act also made no change to the requirement in section 103(b) in TRIA that insurers provide clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program. These disclosures must be made on a separate line item in the policy, at the time of offer, purchase, and renewal of the policy. However, disclosure of the premium must now reflect the premium charged for insured losses (as determined by the revised definition of an act of terrorism).

As stated above, any initial offers of coverage, or offers of renewal of existing policies, made on or after the date of enactment must be consistent with the revised definition of “act of terrorism.” So too, the required disclosure must be made on a separate line item in the policy, at the time of offer, purchase, and renewal of the policy. Treasury realizes that as a practical matter, insurers may have to modify operations and may be subject to

rate and policy form filing and/or prior approval processes, and therefore may need some time to meet these requirements.

Treasury expects that all insurers will provide compliant initial and renewal offers and disclosures as quickly as possible. In this regard, Treasury considers March 31, 2008, to be the latest reasonable date for compliant offers of coverage and disclosures to policyholders (including reprocessing of policies, if necessary, where a compliant post-December 26, 2007 offer and/or disclosure was not possible), barring unforeseen or unusual circumstances. If the March 31 date is not met by an insurer, Treasury will expect the insurer to demonstrate, when submitting a claim for the Federal share of compensation under the Program, why it could not comply by that date.

Does an insurer have to provide a separate, new offer of terrorism risk insurance coverage for property and casualty insurance policies that are in mid-term as of January 1, 2008, if the insurer previously complied with the Act's "make available" requirement when the policy was issued or renewed prior to December 26, 2007?

Because under TRIA regulations, the "make available" requirements apply at the time of the initial offer of coverage or offer of renewal of an existing policy, no new offer is required if coverage for the duration of the policy term was offered under the provisions of the Act at the time of the offer. This is the case whether the offer was accepted or rejected. If no new offer is made, then a new disclosure of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses is also not required, because under TRIA the disclosure requirements apply at the time of offer, purchase and renewal of the policy.

If existing coverage for an act of terrorism does not continue for the duration of the policy term beyond December 31, 2007, such as a case where an exclusion becomes effective upon some circumstance, then a new offer is required for the duration of the policy term.

If for any reason an insurer makes a new offer mid-term, and that offer is after December 26, 2007, then the offer must be based on the Reauthorization Act's requirements. The associated disclosure of the premium must reflect the premium for insured losses in accordance with the revised definition of act of terrorism. Disclosure of the \$100 billion cap must also be provided, as explained below.

What if a policy renewal or application was processed in 2007 for coverage becoming effective in 2008 and the insurer did not "make available" terrorism coverage?

The Reauthorization Act continues the "make available" requirement for insurers under TRIA. If an insurer wishes to receive Federal compensation under the Program for insured losses, the insurer must "make available" terrorism coverage for insured losses for all policies becoming effective in 2008, even if the policy was processed in late 2007 or early 2008. As noted in guidance above, Treasury expects that all insurers will

provide policyholders an offer of terrorism coverage and appropriate disclosures as quickly as possible.

When must the new disclosure to policyholders of the \$100 billion cap on liability be made?

The Reauthorization Act requires a clear and conspicuous disclosure to the policyholder of the existence of the \$100 billion cap under section 103(e)(2) of TRIA. The requirement applies to “any policy that is issued after the date of enactment” of the Reauthorization Act, or December 26, 2007. Under section 103(e)(2), if the aggregate insured losses exceed \$100 billion during a Program Year, Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion, and no insurer that has met its insurer deductible shall be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. The disclosure must be made at the time of offer, purchase and renewal of the policy.

For policies issued after December 26, 2007, this disclosure must be provided to the policyholder at the first occurrence thereafter of an offer, purchase or renewal.

As noted above, Treasury realizes that as a practical matter, insurers may need some time to meet these requirements. Treasury expects that all insurers will provide compliant disclosures as quickly as possible. In this regard, Treasury considers March 31, 2008, to be the latest reasonable date for providing the cap disclosure (including reprocessing of policies, if necessary, where a compliant disclosure was not possible), barring unforeseen or unusual circumstances. If the March 31 date is not met by an insurer, Treasury will expect the insurer to demonstrate, when submitting a claim for the Federal share of compensation under the Program, why it could not comply by that date.

May an insurer still use NAIC Model Disclosure Forms to meet the disclosure requirement for property and casualty insurance policies?

Under 31 CFR 50.17(e) of the TRIA regulations, insurers are permitted to use NAIC Model Disclosure Forms No. 1 and 2 to satisfy the disclosure requirements of section 103(b)(2) of the Act, provided that the insurer uses the most current forms that are available at the time of disclosure and the current forms are deemed to satisfy the disclosure requirements of the Act. The National Association of Insurance Commissioners (NAIC) has recently modified the forms and Treasury has deemed the newly modified forms to satisfy the disclosure requirements, including the cap disclosure requirement. The new forms will be found on the Treasury website at <http://www.treasury.gov/trip>. Insurers are not required to use the NAIC forms, and may use other means to comply with the disclosure requirements.